

UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC 20591

Served: January 29, 1990

FAA Order No. 90-0003

FEDERAL AVIATION ADMINISTRATION,)
)
Complainant,)
)
vs.)
)
RICHARD WILLFORD METZ,)
)
Respondent.)
)

Docket No. CP89CE0003

DECISION AND ORDER

This appeal arises from the Order Assessing Civil Penalty written by Administrative Law Judge Burton S. Kolko on March 9, 1989, granting the FAA's motion to dismiss.^{1/} The FAA's motion to dismiss was based upon the failure of Respondent Richard Willford Metz ("Respondent") to respond to the Order of Civil Penalty which served as the Complaint in this matter. Respondent subsequently submitted a letter dated June 20, 1989, which the law judge treated as a motion for reconsideration. The law judge issued an Order Denying the Motion for Reconsideration on June 29, 1989. Respondent filed an appeal on July 28, 1989. By FAA Order No. 89-0004, I noted

^{1/} A copy of the law judge's order is attached.

that I considered Respondent's letter of appeal, with its attachments, as both a notice of appeal and an appeal brief and ordered that the FAA's reply brief was due within 30 days.

Respondent wrote in his appeal that his request for a hearing was timely, that the letter he received informing him of the withdrawal of the Order Assessing Civil Penalty amounted to advice that the case was dropped, and that he was never provided with a copy of the FAA Rules of Practice. The FAA, in its Motion for Reconsideration of the Decisionmaker's Order, or in the Alternative, Reply Brief, argues that Respondent's appeal was not timely filed and should, as a result, be dismissed. FAA counsel argues that justice will not be served by allowing Respondent to proceed with such a late appeal. In addition, FAA counsel argues that Respondent never filed an Answer to the Order of Civil Penalty/complaint and has never explained the reason for this failure.

A short summary of the procedural history of this case will be helpful to an understanding of my analysis of this matter:

Nov. 29, 1988	Notice of Proposed Civil Penalty was issued by FAA.
Dec. 4, 1988	Respondent submitted evidence and information to demonstrate that violation of the regulations did not occur and that the penalty was not warranted.

Dec. 13, 1988 FAA replied to Respondent's December 4, 1988 letter, explaining the FAA's position, and issued an Order Assessing Civil Penalty.

Dec. 20, 1988 FAA withdrew the Order Assessing Civil Penalty (as prematurely issued). The FAA sent Respondent a separate letter, which was intended to serve as the interim response to Respondent's Dec. 4, 1988 letter. The FAA explained in the interim response that Respondent should proceed with one of the options set forth in section 13.16(g), such as requesting a hearing, and that failure to do so within 10 days after receipt of the FAA's interim response might result in the issuance of an Order Assessing Civil Penalty.

Dec. 22, 1988 Respondent requested a hearing.

Dec. 29, 1988 FAA issued an Order of Civil Penalty; FAA explained that the Order of Civil Penalty served as the Complaint, that Respondent was required to answer the Complaint not later than 30 days from the time it was served on him, and the consequences of failing to file an Answer within that time period. In a letter to the Hearing Docket clerk, FAA counsel suggested that a hearing be held in Des Moines, Iowa.

Jan. 8, 1989 Respondent requested that the hearing be held in Chicago or Rockford, Illinois.

Feb. 17, 1989 FAA filed its Motion to Dismiss Respondent's request for a hearing based upon Respondent's failure to file an answer within 30 days of service of the Order of Civil Penalty.

Mar. 9, 1989 The law judge issued an Order Assessing Civil Penalty, granting FAA's motion to dismiss and incorporating the Order of Civil Penalty by reference. The law judge wrote that although it was clear from the two requests for hearing that Respondent contested the allegations, the requests amounted to a general denial while the Rules of Practice provide that a general denial is deemed a failure to file an answer.

June 14, 1989	Respondent wrote to the law judge, asking why he could not have a hearing.
June 29, 1989	The law judge, treating the June 14th letter as a motion for reconsideration, denied that motion. The law judge explained that under the FAA Rules of Practice, he had no choice but to deny the motion based upon Respondent's failure to file an Answer.
July 28, 1989	Respondent filed an appeal with the FAA Decisionmaker.
Nov. 13, 1989	The Administrator issued FAA Order 89-0004, ordering FAA counsel to respond to Respondent's "appeal brief" within 30 days of the issuance of the order.
Dec. 11, 1989	FAA counsel served the Agency's Motion for Reconsideration of the Decisionmaker's Order, or in the Alternative, Reply Brief.
Dec. 16, 1989	Respondent filed a letter in response to FAA's Motion for Reconsideration of the Decisionmaker's Order.

Timeliness of the Filing of the Notice of Appeal

Section 13.233(a) of the Rules of Practice provides in part that "[a] party shall file the notice of appeal not later than 10 days after entry of the oral initial decision on the record or service of the written initial decision on the parties" 14 C.F.R. 13.233(a). Hence, Respondent's notice of appeal from the law judge's Order Assessing Civil Penalty, which was his initial decision in this matter, was due no

later than March 24, 1989.^{2/} However, since Respondent did not file his notice of appeal until July 28, 1989, his notice of appeal was late. ^{3/}

I will waive the requirement for filing the notice of appeal in a timely fashion only for good cause. Respondent has argued that he was not served with the Rules of Practice in these proceedings, 14 C.F.R. Part 13. Without either a copy of the Rules of Practice or information provided by the law judge regarding appeal rights to the FAA decisionmaker, Respondent, who has been pro se throughout these proceedings,^{4/} would most likely have no way of knowing that

^{2/} The notice of appeal was actually due to be filed in 15 days, because Respondent would have had the benefit of the "mailing rule." See 14 C.F.R. 13.211(e).

^{3/} I agree with FAA counsel that the time period for determining when Respondent's notice of appeal was due began with the issuance of the initial decision, and not with the law judge's order denying Respondent's motion for reconsideration. This is based upon the fact that the Rules of Practice do not provide for any such reconsideration of an initial decision by a law judge.

Moreover, assuming arguendo that the period for filing a notice of appeal did begin with the law judge's denial of Respondent's motion for reconsideration on June 29, 1989, even so Respondent's notice of appeal, filed on July 28, 1989, was filed late.

^{4/} By noting that this Respondent is pro se, I do not suggest, nor should it be assumed, that the Rules of Practice in these proceedings are different for pro se litigants than for those represented by counsel.

he had the right to appeal from the law judge's decision, when a notice of appeal was due, or how to perfect that appeal.

There is no evidence in the public docket or in the record from which I can infer that the Rules of Practice were ever provided to Respondent by FAA counsel. Moreover, and somewhat incredibly, even though in Order No. 89-0004, I specifically noted this was an area of concern, FAA counsel failed to address the issue about whether the Rules of Practice had been served on Respondent in the Agency's Motion for Reconsideration of the Decisionmaker's Order, or in the Alternative, Reply Brief. FAA counsel's brief only refers to what Respondent should have known from correspondence and pleadings sent to him by the prosecutor; FAA counsel never states in that brief that Respondent should have been familiar with any of the Rules of Practice themselves except as summarized in correspondence and pleadings sent by the FAA. Moreover, when the law judge granted Complainant FAA's motion to dismiss, he did not provide any information concerning Respondent's appeal rights. Thus, in this instance, where the Respondent apparently did not have notice regarding his appeal rights or the rules pertaining to the execution of those rights, good cause exists to excuse the late-filing of the Notice of Appeal/appeal brief.

Respondent's failure to file an Answer

Section 13.209(f) of the Rules of Practice provides that "[a] person's failure to file an answer without good cause is deemed an admission of the truth of each allegation contained in the order of civil penalty and an order assessing civil penalty shall be issued." 14 C.F.R. 13.209(f). Without a copy of the Rules of Practice or other guidance provided by the FAA prosecutor, Respondent may not have known that he was required by section 13.209(d)^{5/} to file a separate document in which he either specifically admitted or denied each and every allegation contained in the numbered paragraphs of the Order of Civil Penalty/complaint. 14 C.F.R. 13.209(d). Consequently, it is understandable that Respondent may well have thought that the request(s) for hearing that he filed, which as the law judge noted, made it clear that Respondent contested the

^{5/} Section 13.209(d), 14 C.F.R. 13.209(d) provides:

A person filing an answer shall admit, deny, or state that the person is without sufficient knowledge or information to admit or deny each allegation in each numbered paragraph of the order of civil penalty. A general denial of the order of civil penalty is deemed a failure to file an answer. Any statement or allegation contained in the order of civil penalty that is not specifically denied in the answer is deemed an admission of the truth of that allegation.

allegations in the Complaint, satisfied the requirement (about which he had been informed by the FAA prosecutor) to file an answer not later than 30 days after service of the order of civil penalty. See 14 C.F.R. 13.209(a). Based upon the foregoing, I conclude that Respondent had good cause for failing to file an Answer which contained specific denials of allegations in the Complaint.

Consequently, I will remand this matter to the law judge for further proceedings, and I will specifically require that FAA counsel serve Respondent with a copy of the Rules of Practice. Furthermore, I will order Respondent to file an Answer in accordance with section 13.209 within 30 days of the service upon him of the Rules of Practice.

I remind Respondent that if he fails to file an Answer within 30 days of service of the Rules of Practice on him, his appeal on the merits will be dismissed. In his Answer, Respondent must specifically write whether he admits, denies or lacks adequate information to respond to each numbered paragraph of the Order of Civil Penalty dated December 29, 1988. The Answer must be filed with the Hearing Docket Clerk. 13 C.F.R. 13.209. No document that Respondent has filed as of this date will be construed as a substitute for the Answer.

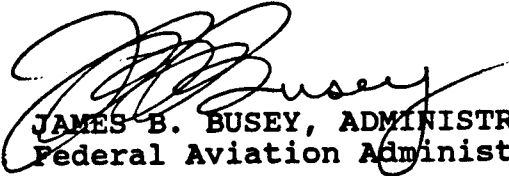
In the future, I expect that the law judges will inform respondents of their appeal rights, including when a notice of appeal and an appeal brief are to be filed. This can be accomplished through the use of boilerplate language based upon section 13.233, 14 C.F.R. 13.233, which can be read into the record at the conclusion of the issuance of an oral initial decision or simply added to a written initial decision.

Additionally, I expect that FAA counsel will inform respondents of the critical requirement contained in section 13.209 regarding the necessity for responding specifically to each of the allegations contained in Orders of Civil Penalty/complaints. This may be accomplished through the use of boilerplate language in the standard paragraph included in all such Orders pertaining to the requirement to file an Answer.

THEREFORE, IT IS ORDERED that:

1. this matter is remanded to the law judge for a hearing on the merits;
2. the FAA prosecutor serve a copy of the Rules of Practice on Respondent within 15 days of the date of service of this Order; and
3. the Respondent file an Answer which meets the

requirements of section 13.209 of the Rules of Practice within
30 days of the date of service of the Rules of Practice.


JAMES B. BUSEY, ADMINISTRATOR
Federal Aviation Administration

Issued this 26th day of January, 1990.